Jagdishprasad Ramlal Vs D.B. Ambashankar Uttamram Malji

Court: Bombay High Court

Date of Decision: Dec. 8, 1933

Citation: 152 Ind. Cas. 405

Hon'ble Judges: N.J. Wadia, J; Broomfield, J

Bench: Division Bench

Judgement

Broomfield, J.
This appeal raises an interesting point of Hindu Law as to the liability of a minor member of a joint family in connection with

a new business started by his grandfather and father. The point arises in this way. On January 18, 1922, a mortgage deed was executed in favour

of the plaintiff in the suit, from which this appeal arises, by defendant No. 1 in the suit, Rao Bahadur Motilal Chunilal Desai, and defendants Nos. 2

and 3, who were his sons. Defendant No. 2 signed the mortgage not only for himself but as the guardian of his minor son, defendant No. 4. The

consideration for the mortgage was Rs. 24,999, and the bulk of this amount, that is Rs. 21,808, was due in respect of advances made by the

plaintiff in the year 1920 for the purpose of financing a ginning factory started by Rao Bahadur Motilal or by him and his sons together in about

1917. The suit was brought to recover Rs. 38,753-10-6 upon this mortgage. The principal question in the suit and the only question in this appeal

is whether the interest of the minor defendant No 4 in the joint family property which was mortgaged to the plaintiff is liable for the mortgage debt.

The trial Judge held that the minor''s interest is liable, relying mainly on the decision of this Court in Bal Rajaram Tukaram v. Maneklal

Mansukhbhai 137 Ind. Cas. 717 : 56 B 36 : AIR 1932 Bom. 136 : 34 Bom. LR 55 : (1932) Bom. 323

2. Now, it is conceded that the decree appealed from was right according to the law as it was understood in this Presidency at the date when the

judgment was delivered. It is necessary to bear in mind and to distinguish (1) the authority of the manager to contract debts for the necessary

purpose of an ancestral business and (2) the liability of the son to pay the debts of his father, apart from any question of necessity. In Sanyasi

Charan Mandal v. Krishnadhan Banerji 67 Ind. Cas. 124 : 49 IA 108 : 24 Bom. LR 700 : 30 MLT 228 : 20 ALJ 409 : 35 CLJ 498 : 43 MLJ 41

: (1922) MWN 364 : 49 C 560 : 26 CWN 54 : 16 LW 536 : AIR 1922 PC 237 it was held by the Judicial Committee that the manager of a joint

family cannot impose upon a minor member of the family the risk and liability of a new business started by himself and the other adult members.

That was a case under the Dayabhaga Law, but that is immaterial in view of the most recent pronouncement of their Lordships in AIR 1932 182

(Privy Council) . In the course of their judgment their Lordships observed as follows (p. 114 Page of 19 I.A.--[Ed.]):

The distinction between an ancestral business and one started like the present after the death of ancestor as a source of partnership relations is

patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its

benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties

As Sir Dinshah Mulla in his Commentary on this case at p. 263 of the 7th Edn. of his Principles of Hindu Law points out:

The decision proceeds on the ground that a minor could not become a partner by contract, though he might be ''admitted to the benefits of the

partnership''; and since a new business could rest only on contractual arrangement, a minor could not be a partner in such business

3. In Annabhat Shankarbhat v. Shivappa Dundappa 110 Ind. Cas. 269 : 52 B 376 : 30 Bom. LR 539 : AIR 1928 Bom 232 it was held that a new

trading business opened by the father as the manager of the family is nonetheless ancestral because it was started only by, the father. But the

decision of the case really turned upon the finding that the trade debts of the father were not immoral and the sons were bound to pay them. The

subject of the father''s power to deal with coparcenary property for payment of antecedent debts is dealt with in Sir. Dinshah Mulla''s book in

para. 29.3, where it is pointed out that the father of a joint Hindu family may sell or mortgage the joint family property including the son''s interest

there in to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons, provided (a) the debt was

antecedent to the alienation and (6) it was not incurred for an immoral purpose.

The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father''s debt not tainted

with immorality. There is no question of legal necessity in such a case.

4. In para. 298 of the same book the meaning of ''immoral'' (avyavaharika) is discussed. ""Avyavharika"" debts include such things as debts for

spirituous liquors, debts due for losses at play; debts due for promises made without consideration; debts contracted under the influence of lust or

wrath; and any debt for a cause repugnaut to good morals. At p. 370 the learned Commentator has a a note on commercial debts. He points out

that an old text of Gautama to the effect that the sons are not liable for their father''s commercial debts has long become obsolete and sons are now

liable for debts incurred by their father in the course of business carried on for the benefit of the family. At p. 262 of the commentary there is a

reference to Annabhat Shankarbhat v. Shivappa Dundappa 110 Ind. Cas. 269 : 52 B 376 : 30 Bom. LR 539 : AIR 1928 Bom 232 which is cited

as laying down the law in the Bombay and Madras Presidencies.

5. Coming now to Bal Rajaram Tukaram v. Maneklal Mansukhbhai 137 Ind. Cas. 717 : 56 B 36 : AIR 1932 Bom. 136 : 34 Bom. LR 55 :

(1932) Bom. 323 it was held again there that sons will be liable to pay the trade debts of their father though the trade may be started by the father

himself. This was stated to be so on the authority of Annabhat Shankarbhat v. Shivappa Dundappa 110 Ind. Cas. 269 : 52 B 376 : 30 Bom. LR

539 : AIR 1928 Bom 232 and Achutaramayya v. Rataniji Bhootaji 92 Ind Cas. 977 : 49 M 211 : 23 LW 193 : 50 MLJ 208 : (1926) MWN 258

: AIR 1926 Mad. 323 The basis of the decision was not that the business could be regarded as ancestral, but that the debts were the father''s

debts and, therefore, the son was liable.

6. Mr. Desai who appears for defendant No. 4, the appellant in this appeal, has contended, at first unequivocally but afterwards with less

conviction, that these authorities have been in effect overruled by the recent pronouncement of the Privy Council in AIR 1932 182 (Privy Council)

. It is interesting to note that the judgment in that case was delivered by Sir Dinshah Mulla, in view of the passage which I have already referred to

in his commentary on the Principles of Hindu Law. That also was a case in connection with a mortgage executed by the adult members'' of a joint

Hindu family governed by the Mitakshara. The main question in the appeal before the Privy Council was whether a part of the consideration for the

mortgage was binding upon minor members'' interests in the joint ancestral property. As to the bulk of the mortgage debt there was no question but

that it was binding upon the whole estate, the debts being either antecedent or for legal necessity. There were disputes as to an amount of Rs.

10,000, the particular dispute which is relevant for our present purposes being as to a sum of Rs. 3,658. This money was borrowed at the time of

the execution of the mortgage for the purpose of carrying on a business started by the father of the minors concerned. The particular passages in

the judgment of Sir Dinshah Mulla on which reliance is placed for the appellant in this case are these (p. 307):-

The only other question is as to the item of Rs 3,658 borrowed for the thika business. It was urged on behalf of the bank that the business was

ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand it was contended

that the business was the personal business of Jagdish Narain and the family had no interest in it; Their Lordships have examined the evidence, and

they consider that the business was started by Jagdish Narain and Raghubir Narain as managers of the family. The business therefore cannot be

said to be ancestral so as to render the minors" interest in the joint family property liable for the debt.

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is

in direct opposition to the ruling of the Board in Sanyasi Charan Mandal v. Krishnadhan Banerji 67 Ind. Cas. 124 : 49 IA 108 : 24 Bom. LR 700 :

30 MLT 228 : 20 ALJ 409 : 35 CLJ 498 : 43 MLJ 41 : (1922) MWN 364 : 49 C 560 : 26 CWN 54 : 16 LW 536 : AIR 1922 PC 237 The

judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the

family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this

subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the

Mistakshara Law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chap. I of the Mitakshara. The judgment

of the Board in Hunoomanpersad Panday v. Babooee Munraj Koonweree 6 MIA 393 : 18 WR 81n : Sev. 253 : 2 Suther 29 : 1 Sar. 552 relied

on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does

not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in

accordance with this view.

7. That part of the case was finally disposed of by their Lordships as follows (p. 308): Page of 6 M.I.A.--[Ed]:-

The mortgage as to Rs. 3,658, being neither for a necessity recognised by the law nor for the payment of an antecedent debt, is, in their Lordships''

view, wholly invalid under the Mitakshara Law as applied in the United Provinces, and it does not pass the shares even of the alienating co-

parceners.

A further point was raised for the first time on behalf of the bank that the bank was at least entitled to a decree for the sale of the minor''s interest in

execution on the principle enunciated in the second of the five propositions laid down by the Board in Brij Narain v. Mangla Prasad 77 Ind. Cas.

689 : 51 IA 129 : 26 Bom. LR 500 : 21 ALJ 934 : 46 MLJ 23 : 5 PLT 1 : 28 OWN 253 : (1924) MWN 68 : 19 LW 72 : 2 Pat. LR 41 : 10 O

& ALR 82 : AIR 1924 PC 50 : 33 MLT 457 : 46 A 95 : 26 Bom. LR 500 : 11 OLJ 107 : 1 OWN.48 : 48 OLJ 232 (PC) But the point was not

taken in the Courts below, and as it might involve, as was conceded, questions of fact not yet tried, it is not open to the bank to raise it at this

stage.

8. The amount in question was accordingly deducted from the amount for which the mortgage was held valid.

9. Now it has been suggested before us that the generality of the language used and the lack of any qualification, particularly in the sentence ""It

does not make any difference that the manager starting the new business is the father"", point to the conclusion that in the case of a liability imposed

on minors in connection with a new business, all such questions as to whether the debt is antecedent or immoral or avyavaharika are irrelevant. But

I am of opinion that that is not so, and towards the end of his argument Mr. Desai himself did not seem to be prepared to go that length. It was

obviously not necessary to decide any such points in the case before their Lordships. The debt there was not an antecedent debt. In the particular

case which had there to be dealt with it would not make any difference whether the manager was the father or not because the conditions

necessary to impose a pious obligation on the sons to pay their father''s debt were not present. Therefore, their Lordships say, the argument that a

business started by the father as manager, even if new, must be regarded as ancestral, is in direct opposition to the ruling of the Board in Sanyasi

Charan Mandal v. Krishandhan Banerji 137 Ind. Cas. 717 : 56 B 36 : AIR 1932 Bom. 136 : 34 Bom. LR 55 : (1932) Bom. 323 In that case, no

doubt, the manager was not the father. But, so long as the only question was whether the business was ancestral, the ratio decidendi would apply

equally to a father. I have already pointed out what the ratio decidendi in Sanyasi Charan Mandal v. Krishnadhan Bannerji 67 Ind. Cas. 124 : 49

IA 108 : 24 Bom. LR 700 : 30 MLT 228 : 20 ALJ 409 : 35 CLJ 498 : 43 MLJ 41 : (1922) MWN 364 : 49 C 560 : 26 CWN 54 : 16 LW 536 :

AIR 1922 PC 237 was. The decision was based upon the law of partnership and contract. The question of the son''s pious obligation to pay his

father''s debts was not considered at all. I think, therefore, that the observations of their Lordships in this judgment are plainly to be read subject to

this, that they were not dealing with a case of an antecedent debt, and they cannot be taken to have overruled the authorities to which I have

referred in so far as they deal with the liability of sons in a joint family--to pay such debts. These authorities are nowhere mentioned in the

judgment.

10. Mr. Desai ultimately appeared to be prepared to admit that if we are satisfied that the debt in this case was an antecedent debt, then he could

not contend that the authority of Bal Rajaram Tukaram v. Maneklal Mansukhbhai 137 Ind. Cas. 717 : 56 B 36 : AIR 1932 Bom. 136 : 34 Bom.

LR 55 : (1932) Bom. 323 has been shaken. I have already stated that the greater part of the consideration for this mortgage consisted of sums

advanced by the plaintiff in the course of the year 1920. There was a small balance which I shall discuss later on. Mr. Desai''s argument is that the

debts cannot be regarded as antecedent because they were in a sense connected with the mortgage. The moneys were all raised for financing the

ginning factory and the mortgage was executed to secure repayment of the debts. Therefore, the debts and the mortgage form one transaction. The

debts cannot be regarded as independent, and not being independent, they are not antecedent. We cannot accept this as a reasonable construction

of what is meant by an antecedent debt. The leading authority on this point is Brij Narain v. Mangla Prasad 77 Ind. Cas. 689 : 51 IA 129 : 26

Bom. LR 500 : 21 ALJ 934 : 46 MLJ 23 : 5 PLT 1 : 28 OWN 253 : (1924) MWN 68 : 19 LW 72 : 2 Pat. LR 41 : 10 O & ALR 82 : AIR 1924

PC 50 : 33 MLT 457 : 46 A 95 : 26 Bom. LR 500 : 11 OLJ 107 : 1 OWN.48 : 48 OLJ 232 At the conclusion of the judgment in that case five

propositions were laid down. They are as follows:

(1). The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but (2) if

he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be

taken in execution proceedings upon a decree for payment of that debt. (3). If he purports to burden the estate by a mortgage, then unless that

mortgage is to discharge an antecedent debt, it would not bind the estate. (4). Antecedent debt means antecedent in fact as well as in time, that is

to say, that the debt must be truly independent and not part of the transaction impeached (5). There is no rule that this result is affected by the

question whether the father, who contracted the debt or burdens the estate, is alive or dead.

11. As to the meaning of antecedent debt, their Lordships say that they entirely agree with the view of the learned Chief Justice in the Full Bench

Madras case, Armughan Chetty v. Muthu Koundan 52 Ind. Cas. 525 : 42 M 711 : 9 LW 565 : (19l9) MWN 409 : 37 MLJ 166 : 26 MLT 96

and they state that the decision in Sahu Ram Chandra v. Bhup Singh 39 Ind. Cas 280 : 44 IA 126 : 19 Bom. LR 498 : 21 CWN 698 : 1 PLW

557 : 15 ALJ 437 : 26 CLJ 1 : 33 MLJ 14 : (1917) MWN 439 : 22 MLT 22 : 6 LW 213 : 39 A 437 which had been the subject of some doubt

and discussion, must not be taken to decide more than what was necessary for the judgment, viz., that the incurring of the debt was there the

creation of the mortgage itself and that there was no antecedency either in time or in fact. Consequently Sir Dinshah Mulla in his Principles of Hindu

Law says (p. 357):--

Antecedent debt'' means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the

transaction impeached. A borrowing made on the occasion of the grant of a mortgage is not an antecedent debt. To constitute a debt an

antecedent'' debt, it is not necessary that the prior and subsequent creditors should be different persons. All that is necessary is that the two

transactions mast be dissociated in time as well as in fact. Hence where a previous mortgage deed is renewed in favour of the same mortgagee,

and the consideration for the subsequent mortgage deed is the amount due, on the earlier one, the alienation would be one for an ''antecedent''

debt, unless the first debt was a mere device and was incurred merely for the sake of creating an antecedence in time and with a view to support

the subsequent deed.

12. These authorities, in my opinion, afford no support for the construction of the word ""antecedent"" which is contended for by Mr. Desai. In the

case in Brij Narain v. Mangla Prasad 52 Ind. Cas. 525 : 42 M 711 : 9 LW 565 : (19l9) MWN 409 : 37 MLJ 166 : 26 MLT 96 itself the debt

was not independent of the mortgage in Mr. Desai''s sense as it was secured by prior mortgages of the ancestral property which were renewed in

the mortgaged impugned. In the present case, so far as the greater part of the consideration is concerned, it was advanced long before the

execution of the mortgage and in any ordinary sense independently of it. There is no connection between the mortgage and these debts except such

as arises from the fact that the mortgage was executed to secure payment of the debt, which existed already. I have no hesitation in holding that the

debts amounting to Rs. 21,000 representing the advance made by plaintiff in 19-0 were antecedent debts. They were not created by the mortgage,

nor were they incurred with a view to support the mortgage. They were not part of the same transaction. The mortgage executed to secure

payment of those debts would, therefore, be binding upon the interest of the minor defendant No. 4, since there is no ground for holding that they

were immoral or avyavaharika. In that respect I think the decisions of this Court in Bal Rajaram Tukaram v. Maneklal Mansukhbhai 137 Ind. Cas.

717 : 56 B 36 : AIR 1932 Bom. 136 : 34 Bom. LR 55 : (1932) Bom. 323 and Annabhat Shankarbhat v. Shivappa Dunappa 110 Ind. Cas. 269 :

52 B 376 : 30 Bom. LR 539 : AIR 1928 Bom 232 cannot be held to be overruled.

13. The balance of the consideration was Rs. 3,190-14-3. Bat it appears from Ex. 211, a letter written by Rao Bahadur Motilal, defendant No. 1,

to the plaintiff, that the greater part of this sum also, that is to say, Rs. 2,516-8-0, represented the amount due to plaintiff on a previous mortgage

executed by defendant No. 1. That also would clearly be an antecedent debt. So that out of the amount of Rs. 3,109-14-3 mentioned in the

mortgage deed as a cash advance made at the time the only actual cash advance, which is to be regarded as an advance made at the time of the

mortgage and not antecedent and independent of the mortgage, is the sum of Rs. 549-6-3. To that extent the mortgage is not binding on the

interest of the minor defendant. But with that exception I hold that it is binding.

14. There is one point taken by the learned Advocate for the respondent which I should briefly mention, and that is this. The ginning factory

according to him was started by Rao Bahadur Motilal, and he was the grandfather of defendant No. 4. Therefore, although on the authority of AIR

1932 182 (Privy Council) a new business started by the father is not to be regarded as an ancestral business so far as the son is concerned, it

should be regarded as ancestral in the case of the grandson. The evidence as to the manner in which the ginning factory business was started is not

very clear or definite, and the probabilities seem to be that Motilal and his sons including defendant No. 2, the father of defendant No. 4, joined in

starting it. If so, of course, it would be a new business of defendant No. 2 also and not an ancestral business in respect of his son defendant No. 4.

But, however that might be, the business could not become an ancestral business either in the case of the son or the grandson until Rao Bahadur

Motilal died. He was still alive at the time the mortgage was entered into and even at the date of the suit. He died subsequently when the suit was

pending. I think, therefore, that there is nothing in this point.

15. As the result of our finding it will be necessary to make a small modification in the decree of the trial Court. A declaration has been given that

the amount due at the foot of the mortgage at the date of the suit is Rs. 38,603-10-6 as against all the defendants. So far as defendant No. 4 is

concerned, however, the principal amount of the mortgage, i.e. Rs. 24,999, must be reduced by Rs. 549-6-3. Interest up to the date of suit will

have to be calculated on that amount and the mortgage will be declared valid as against defendant No. 4 to that amount only. That, however, is a

trifling matter; substantially the appeal fails and must be dismissed with costs.

16. Usual order as to payment of court-fees by defendant No. 4.

N.J. Wadla, J.

17. The mortgage deed was passed to secure debts incurred more than a year before the date of the mortgage fox the purpose of the ginning

business started by defendant No. 1 and his sons defendants Noe. 2 and 3. In view of the decision in AIR 1932 182 (Privy Council) the business

cannot be treated as ancestral. The debts were not incurred therefore for an ancestral business nor for legal necessity. The only question, therefore,

is whether the alienation was or was not for antecedent debts. If the debts are held to be antecedent debts the share of defendant No. 4 in the

family property would be liable. In my opinion there is no doubt that the debts, with the exception of the small amount of Rs. 549 and odd, were

antecedent debts. The loans to secure which the mortgage deed was passed were advanced on various dated in 1920. Accounts were made up at

the end of 1920 and 1921 and the mortgage deed was passed in January, 1922. The money was not advanced as part of the mortgage transaction

or a short time previous to it. The debts had existed independently of the mortgage. They had been incurred at rates of interest different from that

stipulated in the mortgage deed, and from the letter Ex. 231 written by defendant No. 1 to the plaintiff on April 16, 1920, that is soon after the time

when the loans began to be advanced, it would appear that at that time there was no intention of securing the debts by a mortgage deed, and that

the original arrangement was that the plaintiff, in return for the help which he gave to the ginning business in the shape of the loans, was to receive,

over and above the stipulated rate of interest, a certain amount per bhar of cotton ginned. The debts, therefore, were antecedent not merely in time

but also in fact, and their having been incurred for the purpose of the ginning business and to the same person to whom the mortgage deed was

passed, does not in any way make them a part of the same transaction as the subsequent mortgage deed. For these reasons 1 consider that the

debts must be regarded as antecedent debts, and the share of defendant No. 4, the appellant, in the ancestral property must be held to be liable. I

therefore concur in the order passed.